Why don’t they just stop stopping the internet?

Tanmay Singh 2021-10-26T11:04:36

India is infamous for being the internet shutdown capital of the world, accounting for over two times as many internet suspensions as the rest of the world combined! This is a country with an estimated 750 million internet users – a number projected to double in twenty years. Unfortunately, internet shutdowns are rampant even after the Supreme Court of India pronounced its judgment in *Anuradha Bhasin v. Union of India* in January 2020, granting constitutional protection to the use of the internet for exercising the right to freedom of expression, among others. The Court provided detailed guidelines and safeguards to be adopted by the state before ordering the internet to be suspended.

Restrictions in the exercise of one’s free speech rights through the internet are allowed only in exceptional circumstances of public emergency — and must be temporary, limited in scope, lawful, necessary, and proportionate. These are the Supreme Court’s guidelines on when and how a suspension may be ordered, but the recent instances of internet shutdowns clearly show the opposite. The circumstances in which shutdowns have been ordered are rarely extraordinary (sometimes as frivolous as preventing cheating in exams), have the widest possible scope, have not been shown to be necessary, and are anything but proportionate.

On diving deeper into the most recent instances of internet shutdowns over the past two months, three main motivations are revealed: (i) prevention of cheating during state-wide examinations, (ii) an “apprehension” of public unrest during political protests or unrest, and (iii) actual occurrence of violence during a civil unrest or an instance of terrorism. It is clear that only one of these motivations could possibly justify the extreme step of suspending the entirety of the internet over a large area – don’t forget that the scale of India’s population density means that even when a suspension is ordered in the local administration of a district, it can still affect up to 4 million people! And yet the reality is that shutdowns are imposed arbitrarily with little to no guidance on the decision-making process in the background.

The Supreme Court further required that, through some suitable mechanism, the orders for internet suspension must be made freely available, to enable the affected citizens to be able to challenge such orders in the Court’s writ jurisdiction. Unfortunately, states nevertheless fail to publish internet suspension orders before the eventual suspension. Effectively, the major issue in India is currently the lack of implementation mechanisms to enforce this (and other) landmark judgment(s) of the Supreme Court. How is this possible?

We argue that India’s frequent internet shutdowns are caused not just by the government’s disregard for citizens’ rights to access to information, but also to systemic inefficiencies that fail to communicate constitutional decisions from

the Supreme Court to implementing authorities, and to toothless and ineffective enforcement mechanisms for such decisions.

A larger issue of enforcing constitutional decisions

The non-enforcement of Supreme Court judgements comes down to a lack of a clear constitutional framework to ensure that these decisions, which are binding on governments, are actually followed by those governments. For example, when various states, through access-to-information requests filed by the Internet Freedom Foundation, were asked whether internet shutdown orders were made publicly available per *Anuradha Bhasin*, the states of Meghalaya, Andhra Pradesh and the Union Territory of Andaman and Nicobar Islands admitted to not having followed the *Anuradha Bhasin* guidelines. In fact, the state of Meghalaya admitted that it was not aware of the Supreme Court's decision at all! This was shocking, but not surprising. In India, there is no clear Standard Operating Procedure for how a Supreme Court's decision is to be communicated to the relevant officers in-charge in the Central or State Government, as the case may be. There is also no mechanism of ensuring that the Supreme Court's decisions are formally incorporated in the law of the land.

In December 2020, an application was filed before the Supreme Court seeking directions to ensure government compliance with the guidelines issued by the Supreme Court in the *Anuradha Bhasin* judgment, which has not even been listed for hearing as of yet. As the application for compliance remains pending, internet shutdown orders continue to be issued on an ad hoc basis with no streamlined procedure, safeguards, or judicial oversight in place.

In another similar case, *Shreya Singhal v. Union of India* in 2015, the Supreme Court ruled that the infamous Section 66A of the Information Technology Act, 2000 (which criminalised – with up to 3 years' imprisonment – the sending of "offensive messages" over the internet, without clearly defining what "offensive" meant) was unconstitutional and struck it down. It was a landmark decision, which was much celebrated in its day. But what happened after? A study tracking cases under Section 66A showed that almost twice as many cases have been registered by the police under this section in the six years after it was struck down than in the six years that it remained unceremoniously on the books. These cases are not immediately thrown out of court either, nearly 800 remain pending before India's lower courts today.

There is no formal requirement to the government to amend the statute books to reflect such decisions, so Section 66A remains on the books with all its words and phrases, with only a tiny footnote at the bottom of the page pointing out to the conscientious reader that the Section has been struck down. In the absence of this formalisation, the local police station would be expected to consult legal statutes, and also recall every Supreme Court decision that comes to their station by post. A requirement to the government to proactively, and in a time-bound manner, amend the statute books in response to a Constitutional decision would fix that.

There is also no standard mechanism for communicating the highest court's decisions to the lowest levels of law enforcement, to ensure that the message travels from the centre of political power to the remotest regions of civic administration. The farthest administrative capital from New Delhi, the national capital, is Port Blair at nearly 3500 kilometres away. The distance between the centres of political influence and the remote, rural areas tasked only with administrative compliance are far greater than that. As of last count, there were 718 districts in India, sharing 672 district courts among them. Detailed circulars with instructions not to entertain cases of Section 66A would have to be sent to them. A 2017 study by the Bureau of Police Research and Development counted more than 15,000 police stations in India. All of them would have to be sent a copy of the 181-page judgment in *Shreya Singhal,* with a circular instructing them not to charge internet users under Section 66A. The scale of the exercise is daunting, made worse by the fact that the same study found that two-thirds of those police stations were in rural areas and more than 400 police stations did not even have a telephone line!

The State Government of Meghalaya, to remind you, responded saying they were not even aware that the Supreme Court had given any decisions on internet shutdowns – 8 months after *Anuradha Bhasin!*

A difference in priorities – Ease of administration v. Citizen's rights

The best solutions to a problem approach it from multiple perspectives. There is no denying that broader systemic issues regarding communication of Supreme Court decisions to remote Indian villages, and regarding a formalised mechanism for quickly and appropriately amending rule books are important to tackle. But this doesn't absolve the central and state governments from having to fix the core of the problem – the internet suspensions themselves.

It ultimately comes down to a question of priorities – shutting down internet access for 4 million people on an "apprehension" that violence *may* break out at a constitutional protest is easy, but protecting the citizen's fundamental right to access information over the internet while also ensuring that public safety is protected at a protest is not.

We cannot trust the state to forego the easy option for the right option. And that's why we need transparency and accountability. The Supreme Court recognised this when it ordered that all internet suspension orders must be made available widely, to enable affected citizens to challenge these orders in Court.

In order to balance the state's interest in preserving public safety with a citizen's right to free speech, business/trade, and education, it is imperative that the state holds itself accountable by providing explanations and maintaining transparency around procedures leading to internet shutdowns. Governments must proactively disclose the reasons for imposing internet shutdowns, their duration, jurisdiction, with justifications of the legality, legitimacy, and proportionality of the proposed imposition. It must be also explained why blocking a particular section of the internet

would not serve the purpose instead of imposing a complete internet shutdown. The orders must also be published at least 2 working days before the internet is actually shut down.

Conclusions

Being stripped of the freedom to use the internet in this age and time is like depriving one of having the most important meal of one's day. The adverse impact of internet shutdowns in India cannot be emphasised enough. In 2020, the Indian economy suffered losses to the tune of $2.8 billion due to 129 separate instances of Internet suspension, which affected 10.3 million individuals. The Internet is a source of communication, information, entertainment, health care, education, livelihood and is essential for the exercise of democratic values. This has become particularly true in the age of the pandemic. The harm — economic, psychological, social, and journalistic — caused by such suspensions outweighs any speculative benefits.

Internet suspensions in India are often justified on the grounds that they are limited to mobile data services and not broadband services. As a direct consequence of this trend, internet suspensions tend to more adversely affect those from lower socio-economic backgrounds, since broadband is expensive and not an option available to those from lower socio-economic classes.

Hopefully, we have been able to show that the problem isn't as simple as "*India has too many internet shutdowns*". A whole host of reasons – administrative, constitutional, political and even logistical have brought us here. While the solution may seem as simple as "*Stop stopping the internet!*", it requires a multi-faceted approach to solve the various problems that exist beyond the administrative disdain for internet use by Indians.

Disclaimer: The authors are part of the legal team that filed the application to ensure government compliance with the Anuradha Bhasin guidelines, mentioned in the post above. The organisation where the authors work also provided legal assistance and representation to petitioners in petitions that formed part of the Anuradha Bhasin judgment.
